AdvanceMe Inc v. RapidPay LLC
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EXHIBIT V

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Defendants' Reply Regarding Their Statement of Undisputed Facts
(Response to Plaintiff's Appendix A)

According to the Local Rule CV-56(c),

> In resolving the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion, as supported by proper summary judgment evidence.

In Defendants' opening brief, Defendants' presented undisputed facts supported by admissible, competent summary judgment evidence. However, contrary to the mandate of Local Rule CV-56(c), Plaintiff has responded with only attorney argument and the conclusory and unsupported Shamos Declaration. As this Court has noted:

> Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. The party opposing summary judgment is required to identify evidence in the record and articulate the manner in which that evidence supports his claim.

Sparks v. Lowe's Home Centers, Inc., 341 F. Supp. 2d 671, 673 (E.D. Tex. 2004) (internal citations omitted). Because Plaintiff has identified no competent summary judgment evidence to create a genuine issue of material fact, all of the Undisputed Facts supporting Defendants' Second Motion for Partial Summary Judgment should be deemed admitted without controversy.

In Plaintiff's opposition it does not dispute, or merely relies on only attorney argument to "Dispute," Defendants' Undisputed Finding Nos. 1-10, 16-17, 19, 21-22, 25-32, 35, 42-43, 46, 51-54, 56-57, and 61. As such, these statements should be deemed admitted for purposes of this motion on that basis alone.

With respect to most of the remaining statements, Plaintiff identifies testimony ancillary or irrelevant to the statement offered, and submits that as contrary evidence, or merely argues its own expert's conclusory "interpretation" of the evidence creates a genuine issue of material fact.

For example, with respect to Defendants' Undisputed Finding Nos. 11-13, 33, and 47, Plaintiff relies on conclusory assertions that the documents show that Diners Club was not the merchant processor. However, as explained fully in Defendants' Reply Brief (see section (II)(A)(2)), Plaintiff's and its expert's conclusory assertions – which are contrary to every witness' testimony – do not create a genuine issue of material fact.

In addition, each of Defendants' Undisputed Finding Nos. 14-15, 18, 20, 23-24, 34, 44-45, 48-50 relate to the forwarding, receiving and applying of a portion of the "payment" received by the merchant. However, each of Plaintiff's supposed contradicting factual statements, and its supporting evidence, deliberately refers to the "transaction" instead of the "payment." There is no dispute that all LeCard "transactions" are forwarded to Clever Ideas by Diners Club. That is how Clever Ideas learns about the transactions and knows what portion of the payment it will receive from Diners Club, what the tax and tip portion is, and how much will be applied to reduce the restaurant's obligation. There is also no dispute that Diners Club only forwards 72% of the "payment" for the LeCard transactions to Clever Ideas. All of Plaintiff's statements, and the supporting evidence, are irrelevant to Defendants' Undisputed Facts, which relate to the payment forwarded, received or applied in the Clever Ideas/LeCard prior art. Plaintiff has cited no evidence contradicting (1) the fact that only a portion of the payment was forwarded by Diners Club to Clever Ideas, (2) the fact that Clever Ideas received the portion of the payment forwarded electronically, and (3) that Clever Ideas applied that portion of the payment received to reduce the outstanding obligation of the merchant. Accordingly, Defendants' Undisputed Finding Nos. 14-15, 18, 20, 23-24, 34, 44-45, 48-50 should also be deemed admitted.

The remainder of Defendants' Undisputed Facts, Nos. 36-41, 55[1], 58-60 and 62-63, relate to the obviousness of dependent claims 2-4 and 11-13, and the public use, public's knowledge and prior invention of the Clever Ideas prior art, which Defendants have responded to in their Reply Brief in sections (II)(G) and (II)(D), (E), respectively.

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[1] Defendants' Undisputed Finding No. 55 relates to Barbara Johnson's invention date. Even if the Court accepts Plaintiff's argument as to when the invention was conceived by Barbara Johnson, the claims of the '281 patent are invalid because the invention date of the Clever Ideas/LeCard prior art is still years before Ms. Johnson's invention date.